No. 95-566

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

JAMES ALLEN EGELHOFF,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

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PETITIONER'S REPLY BRIEF

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The brief in opposition filed by the Respondent, James Allen Egelhoff, erroneously contends that the petition for writ of certiorari should be denied because the state court relied upon an adequate and independent state ground; because the effect of intoxication on Respondent's mental state is irrelevant; because there is not considerable disagreement among state courts of last resort on the constitutional issue; and because a prior ruling of this Court has considered a similar issue.

I.

Respondent claims that the Court cannot exercise jurisdiction because there is an adequate and independent state ground. This Court, in *Michigan v. Long*, 463 U.S. 1032, 1042 (1982), created a new rule, or presumption, which assumes that the Court has jurisdiction to reach the federal question on review "when it is not clear from the opinion

itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law."

In the instant case, it is clear that the Montana court did not rest its decision on an independent state ground. Only one reference is made to the Montana constitution and this is contained in Justice Nelson's special concurring opinion which is joined by only one other justice. The opinion of the court below relied exclusively on its understanding of the requirements of the Due Process Clause as enunciated in *In re Winship*, 397 U.S. 358 (1970), and other federal cases. Not a single state case was cited to support the state court's determination that the statute was unconstitutional, either in the opinion of the court or in the concurring opinions. Further, Respondent does not and cannot assert that Montana courts have provided greater protection under the due process clause of the state constitution than is afforded under the Fourteenth Amendment to the United States Constitution.

Under *Long*, this Court's jurisdiction is presumed absent a plain statement that the decision below rested on an adequate and independent state ground. There is no such plain statement in the decision below. It is clear that the state court "felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

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II.

The Respondent's contention that the validity of the intoxication instruction and the statute from which it was taken is irrelevant is startling. He raised the instruction's constitutionality on appeal before the Montana Supreme Court and prevailed, with the result that his convictions for two deliberate homicides were overturned. Additional Reply Br. Appellant at 10, 21-31 (App. 31a-45a). If Respondent's position concerning the relevancy of the instruction in the

opposition to the petition herein is credited, the only conclusion is that his trial and conviction in fact were unaffected by the principal error he alleged on direct appeal. The court below obviously did not so believe. Regardless of the instruction's relevancy during his trial, however, the Montana Supreme Court's reversal of his conviction on this issue is sufficient to establish a justiciable controversy warranting this Court's review. *See Asarco v. Kadish*, 490 U.S. 605, 618-19 (1989).

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III.

Respondent argues that there is not considerable disagreement among state courts to warrant review by this Court. A conflict between the decisions of the highest courts of two or more states on a federal question is a valid ground for review. *Fuller v. Oregon*, 417 U.S. 40, 42 (1974). Even in the absence of a conflict, this Court may grant the petition for certiorari where a state court has decided a substantial and

unsettled federal question arising under the Constitution or where it has rendered an erroneous or at least doubtful decision on the constitutional question. *Oregon v. Kennedy*, 456 U.S. 667, 668-69 (1982) (state court took an "overly expansive view of the Double Jeopardy Clause"); *Tibbs v. Florida*, 457 U.S. 31, 39 (1982) (certiorari granted "to review this interpretation of the Double Jeopardy Clause"); *see also Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because the state court "has read *Miranda* too broadly"). It cannot be argued that there is an important need for uniformity in the interpretation of the Constitution.

Respondent's attempt to distinguish the decisions of the highest courts of various states is unavailing. It is clear that the highest courts of at least four states have held that a defendant's federal constitutional right to due process is not violated when a jury is precluded from considering evidence of voluntary intoxication in determining whether the defendant

possessed the requisite mental state. The Montana court alone has ruled to the contrary.

IV.

Respondent claims that this Court decided a similar issue in *Hopt v. People*, 104 U.S. 631 (1881), and, therefore, the issue need not be "revisited." The issue involved in *Hopt* is not similar to that presented here. Respondent concedes that the decision in *Hopt* did not rest on due process grounds. Rather, the Court simply ruled that, pursuant to a Utah statute, Hopt was entitled to an instruction that his intoxication might be taken into consideration in determining the purpose, motive, or intent with which he committed the acts in a prosecution for first degree murder. The decision in *Hopt* rests exclusively on statutory grounds and does not implicate the Due Process Clause whatsoever.

This Court has never directly addressed the constitutionality of legislative limitations on voluntary

intoxication evidence. The Montana court has decided an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

For these reasons, the reasons articulated in the petition, and the reasons set forth by the eight states who have joined Montana as amici curiae in this matter, the State of Montana requests that the writ issue.

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November 1995

IN THE SUPREME COURT OF THE
STATE OF MONTANA

No. 93-405

STATE OF MONTANA,

Plaintiff and Respondent,

vs.

JAMES ALLEN EGELHOFF,

Defendant and Appellant.

ADDITIONAL REPLY BRIEF OF APPELLANT

On Appeal from the District Court of the
Nineteenth Judicial District of the State of Montana,
in and For the County of Lincoln

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II. § 45-2-203, M.C.A. IS UNCONSTITUTIONAL AS BEING VIOLATIVE OF THE ACCUSED'S RIGHT TO PROCEDURAL OR SUBSTANTIVE DUE PROCESS UNDER THE CONSTITUTIONS OF THE STATE OF MONTANA AND THE UNITED STATES OF AMERICA, BY PROHIBITING A JURY'S CONSIDERATION OF THE ACCUSED'S VOLUNTARY INTOXICATION IN DETERMINING HIS MENTAL STATE WHICH IS AN ELEMENT OF THE OFFENSE OF DELIBERATE HOMICIDE.

. . . .

C. *Consideration by a jury of voluntary intoxication is constitutionally required as a component of substantive due process.*

The state asserts that "voluntary intoxication is a gratuitous defense and not a constitutionally protected defense to criminal conduct." It cites several state and federal

authorities in support. When citing to other jurisdictions, the state confuses the evidence of voluntary intoxication as a *defense* (which has not historically been allowed in Montana), and the consideration of voluntary intoxication as one of the factors which the jury can consider when deliberating on whether the government has carried its burden of proving mental state. The latter, referred to by some of the commentators and courts as the "exception" to the general rule that "voluntary intoxication is not a defense," recognizes the essential constitutional rule that there must be proof by the state of the mens rea in order to establish criminal culpability. *Morissette, supra*, 342 U.S. at 250-251. Although *Morissette* construes a federal penal statute, it has been noted that the *Morissette* court went "out of its way to emphasize the important of mens rea as a prerequisite to penal liability and suggested, at least, that statutes dispensing with culpability for traditional criminal offenses would impair the constitutional

protections accorded to defendants." Jeffries, *supra*, 88 *The Yale Law Journal* at 1374 n. 144.

The state relies on the case of *State v. Souza*, 813 P.2d 1384 (Hawaii, 1991). The state characterizes the Hawaii statute as "substantially the same as Mont. Code Ann. § 45-2-203." (State's Brief at page 10, footnote 3). There is a significant difference, however, The Hawaii statute provides that,

> Evidence of self-induced intoxication of the defendant is admissible to prove or negative conduct or to prove state of mind sufficient to establish an element of the offense. Evidence of self-induced intoxication of the defendant is not admissible to negative the state of mind sufficient to establish an element of an offense.
>
> HRS § 702-2330

This language is more consistent with the use of intoxication as a *defense*, which is not the argument here. Presenting evidence to negate proof by the state is in the nature of an affirmative defense such as justification or duress. It anticipates that the state has carried its burden of proof and

that then the defense presents affirmative evidence to rebut the proof. That differs from the situation where the state, as part of its proof, must prove the requisite mens rea, which proof would necessarily, in the case of an intoxicated person, include evidence that, despite the intoxication, the defendant had the requisite mental state which is an element of the charged offense. This evidence is then considered by the jury in its deliberations. An additional qualifier when reading *Souza* is that defendant was charged with murder in the second degree, not first degree. It may be that the charging authority took Souza's intoxication into account when charging a lesser offense as there do not appear to be any other grounds for mitigation in the opinion. Thus, as in *Sage*, the effect of intoxication evidence reduces the degree of culpability. One cannot extrapolate from *Souza* that had he been charged with deliberate homicide the same result would have obtained.

The *Souza* court cited, and the state here cites *United States ex rel. Goddard v. Vaughn*, 614 F.2d 929, 935 (3rd

Cir.), cert den. 449 U.S. 844, 101 S. Ct. 127, 66 L.Ed.2d 53 (1980), and makes much of the language in *Goddard* that voluntary intoxication is a "gratuitous" defense. Again, the *Souza* court and the state confuse the use of intoxication evidence as a *defense* rather than evidence relevant to mental state. The state case out of which the federal action arose, *Goddard v. State*, 382 A.2d 238 (Del. Supr. 1977), was a prosecution for murder, rape and conspiracy. There, the defendant complained that he was the victim of impermissible burden-shifting when the court instructed the jury that defendant had the burden of proving intoxication. The statute there read, ". . . voluntary intoxication is an affirmative defense in a prosecution for a criminal offense only if it negatives the element of intentional or intentionally," *id.* at 239. The federal habeas opinion, in the 3rd Circuit, phrased the question posed as, "Once the defense of intoxication has been raised, was the prosecutor required to prove its absence?" 614 F.2d at 931. The court analyzed the cases respecting

burden-shifting, and concluded that "A gratuitous defense having been provided, it is not constitutionally perverse for the state to insist that the defendant assume the responsibility of proving his contention by a preponderance of the evidence." *Id.* at 935. There is no support in *Goddard* for the notion argued by the state in this case that evidence of voluntary intoxication cannot be considered by the jury; the only thing that can be said about *Goddard* is that the state may allow affirmative defenses, and, if they are allowed, can require the defendant to present evidence of that defense. The Third Circuit did not find unconstitutional burden-shifting because the "plaintiff's case did not rely on a presumption that the defendant was called upon to rebut," *Id.* at 936. Appellant does not agree with the state's assertion that the "gratuitous defense" language is not dictum (see State's Brief at page 10, note 2) but the assertion is irrelevant to the issue presented here, which is NOT that the State must allow a "defense" of voluntary intoxication.

The state's citations to other jurisdictions are not helpful, inasmuch as the underlying statutory schemes are not identical to that of Montana, nor do they defeat appellant's argument in any event. The Pennsylvania statute, for instance, allows consideration of voluntary intoxication in homicide cases to reduce the degree of murder, see page 21, footnote 5 to the state's Additional Brief. The state also recites that, "The State of Virginia allows the defense of voluntary intoxication only to reduce the crime of murder from first to second degree," see page 14 of the Additional Brief of Respondent. That Delaware may have eliminated the affirmative defense of voluntary intoxication (the defense discussed in *Goddard*) does not mean that it cannot be considered by the jury in a first degree murder case. Arkansas, Mississippi and Texas are also cited for the rule that voluntary intoxication is "not a defense." That is not the issue here.

Although not cited by the state, of all of the jurisdictions surveyed by this writer, Missouri most closely follows the rule urged by the state. There, "voluntary intoxication is not a defense to a criminal charge and . . . the rule does not even allow a jury to consider such intoxication on the issue of specific intent." *State v. Hegwood*, 558 S.W.2d 378, 381 (Mo.App. 1977). The court there held that "we are constitutionally bound to follow the last controlling decision of the Supreme Court of Missouri," and ruled that it was procedurally barred from considering the constitutionality of a prior case, *State v. Richardson*, 495 S.W.2d 435 (1973), as the issue had not been properly preserved for review. In *Richardson*, the court acknowledged that the Missouri rule was not that of the majority of states, but did not reject it, stating that, ". . . we decline to consider overturning a rule which goes back to 1855 and which has been reaffirmed many times since." It is clear that the Missouri rule is an anomaly, and the only rationale its longevity. Montana has, by contrast,

recognized that voluntary intoxication may be considered by the jury for years. It is an integral part of our common law.

The state urges the court to reject the rationale of *Terry v. State*, 465 N.E. 2nd 1085 (Ind. 1985). Appellant would counter that it is a correct statement of the law and, furthermore, more accurately reflects the rule which the Montana courts have followed for years. There, the Indiana Supreme Court held unconstitutional a state statute which provided:

> "(b) Voluntary intoxication is a defense only to the extent that it negates an element of an offense referred to by the phrase 'with intent to' or 'with an intention to." [I.C. § 35-41-3-5]

The court there did not rely on the historical differentiation between crimes of "specific" and "general" intent. Rather, the court analogized the effect of voluntary intoxication to that of mental illness, holding that a defendant could offer a defense of voluntary intoxication to *any* crime, 465 N.E.2d at 1088.

In *Terry*, the crime charged was attempted murder. The state contended that because the murder statute did not contain the words "with intent to" or "with an intention to," then the defendant was not entitled to an instruction on the effect of voluntary intoxication on mens rea. 465 N.E.2d at 1087.

The *Terry* court rejected this reasoning, held that the statute was void and without effect and stated that, "A defendant in Indiana can offer a defense of voluntary intoxication to any crime." It based its decision on the language of any earlier concurring opinion, in which the writer concluded that the statute would be unconstitutional, *Sills v. State*, 463 N.E.2d 228 (1984). The murder statute in Indiana recited, in part:

"A person who:

(1) Knowingly or intentionally kills another human being; . . . ." IC § 35-42-1-1 (1)

In the *Sills* concurring opinion, 463 N.E.2d at 242, Justice Givan recited:

> "The murder statute clearly requires an intentional act on the part of the perpetrator. To interpret the statute to require the specific language that is contained in the quotes of the statute is to make the statute ludicrous indeed.
>
> . . . .
>
> This brings us to the proposition in the case at hand where the majority holds that intoxication is a defense only in cases where the phrases 'with intent to' or 'with an intention to' appear in the statute. Although this is the exact language of the statute above quoted, it poses an impossible situation in criminal jurisprudence. In order to form intent in any event the perpetrator must be acting consciously and competently. Any situation which renders the perpetrator incapable of forming intent frees him from the responsibility of this acts.
>
> . . . .
>
> If a completely *non compos mentis* inmate of a mental hospital managed to escape his guards, acquire a motor vehicle and speed into the traffic of the city, thereby violating one or more traffic laws, he of course could not be prosecuted because he is *non compos mentis*, not only incapable of forming the

> intent to commit the act whether it be an act of *malum in se* or *malum prohibitum*.
>
> Likewise, if intoxication, whether it be voluntary or involuntary, renders that individual so completely *non compos mentis* that he has no ability to form intent, then under our constitution and under the firmly established principles of the *mens rea* required in criminal law, he cannot be held accountable for his actions, no matter how grave or how inconsequential they may be.

The *Terry* court concluded that

> Any factor which serves as a denial of the existence of *mens rea* must be considered by a trier of fact before a guilty finding is entered. Historically, facts such as age, mental condition, mistake or intoxication have been offered to negate the capacity to formulate intent. The attempt by the legislature to remove the factor of voluntary intoxication, except in limited situations, goes against this firmly ingrained principle. We thus hold Ind. Code § 35-41-3-5(b) is void and without effect.
>
> 465 N.E.2d at 1088.

As conceded by the state, the majority of jurisdictions do allow the evidence of intoxication, even where voluntarily induced, either as a "defense" or to considered when

determining mental state. The *Terry* decision simply reiterates the substantive due process rationale for the rule that most courts have honored, and which the Montana law enforced until 1987.

D. The amendment of the statute lessened or negated the state's burden of proof.

In its opening brief, appellant cited authority for the proposition that it is unconstitutional to dispense with the state's burden to prove mens rea. This argument is based on the practical reality that the burden of proof is lessened when the defendant is voluntarily intoxicated but yet the jury cannot consider that evidence; they must, perforce, base their deliberations on only some, but not all, evidence of defendant's mental state. *Morissette v. United States*, 342 U.S. 246 (1952), *In re Winship*, 397 U.S. 358, 364 (1970), *Sandstrom v. Montana*, 442 U.S. 510 (1978).

The state repeatedly claims that appellant had the opportunity to rebut the state's proof of means rea, but does

not say how. Quoting *Souza*, the state declares that appellant could still have attempted to convince the jury that he did not act "purposely" or "knowingly," nor was the state relieved of the burden of establishing the requisite mens rea. The practical effect of this is ludicrous. How does a defendant with a .36 blood alcohol level attempt to convince a jury he did not act "purposely" or "knowingly" without resort to evidence of his intoxication? Nor need the court fear that allowing the proof dictates the result: the jury may reject it. And, each case must turn on its individual facts, and if there is no credible evidence of intoxication, the trial court is certainly able to exclude reference to it under standard rules of evidence. But to disallow its consideration entirely denies substantive due process.